Exhibit A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

03 MD 01570 (GBD)(SN)
Remote Teleconference

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New York, N.Y.
October 28, 2021
4:30 p.m.

Before:

HON. SARAH NETBURN

Magistrate Judge

APPEARANCES

LANKER SIFFERT & WOHL LLP
Attorneys for J. Fawcett
MICHAEL GERBER
HELEN GREDD

KELLOGG HANSEN TODD FIGEL & FREDERICK PLLC
Attorneys for Defendant Kingdom of Saudi Arabia
MICHAEL K. KELLOGG
GREGORY RAPAWY
ANDREW SHEN

KIRSCH & NIEHAUS
Attorney for Kreindler & Kreindler
EMILY KIRSCH

(The Court and all parties appearing via remote teleconference)

THE COURT: Good afternoon, everybody. This is Judge Netburn. This case is In Re: Terrorist Attacks of September 11, 2001. The Docket No. is 03 MD 1570.

I know we have a number of lawyers on the line. I think for purposes of the court reporter and to facilitate the transcript, let me first ask for the lawyers representing John Fawcett to state their appearance.

MR. GERBER: Good afternoon, your Honor. Michael Gerber and Helen Gredd from Lanker Siffert & Wohl on behalf of Mr. Fawcett.

THE COURT: Thank you. And on behalf of the defendant Kingdom of Saudi Arabia.

MR. KELLOGG: Good afternoon, Judge Netburn. This is Michael Kellogg and my two colleagues, Gregory Rapawy and Andrew Shen are with me.

THE COURT: Thank you. As I indicated, I know that there are a number of people on the line. I don't know if anybody else intends to speak, and if so, if they'd like to make an appearance. I know we have Emily Kirsch on the line for Kreindler & Kreindler.

MS. KIRSCH: Yes, your Honor, I'm here. I don't intend to speak but perhaps should just enter an appearance.

THE COURT: Very well. Any other lawyers wish to

enter an appearance now? And if not, if those lawyers choose to speak later, they can enter an appearance at that time.

Hearing none, we are here on the question of Mr. Fawcett's Fifth Amendment privilege. I've reviewed four letters: A letter from the defendants Saudi Arabia filed on October 22 and a response letter filed on October 25. And then I received a letter on October 27 from Mr. Fawcett's lawyer in connection with a D.C. District Court case that they wanted me to read, which I have; and then a responsive letter -- I should say not a responsive letter -- a different letter filed by the kingdom on October 28. I believe I have all of the information that is before me.

Why don't I begin by turning to Mr. Gerber, since it's your client who has submitted these declarations and who is now seeking to assert his Fifth Amendment rights.

MR. GERBER: Thank you, your Honor.

There is no dispute that *Klein* is the operative test here. As we understand it, there's no dispute that there are two parts to that test, to the *Klein* test: Whether there will be prejudice to a party and whether the witness had reason to know that his prior statements would constitute a waiver. Both prongs would yield the same result. There was no waiver, and Mr. Fawcett should be permitted to exercise his Fifth Amendment right against self-incrimination.

With the Court's permission, I'm going to take up each

of those prongs in turn. As to the first prong, *Klein* makes clear that waiver should be inferred only in the most compelling of circumstances, and critically, crucially *Klein* explains, *Klein* holds that such circumstances do not exist unless a failure to find a waiver would prejudice a party to the litigation. And *Hutton* makes the same point, the exact same point. The question is whether the fact finder might rely on the prior statements to the detriment of a party to the lawsuit.

And here, as we say in our letter, the Court can strike portions of the affidavit so the parties are no worse off than if Mr. Fawcett had never filed his declarations. Mr. Fawcett is not asking the Court to strike his admissions regarding his own conduct. That is what it is. But by striking those portions of a declaration that arguably benefit a party, the Court can ensure that there is no prejudice here. And that is exactly the approach that the Court took in the *Vitamins Antitrust Litigation* case. That's what happened in *E.F. Hutton*. That's what happened in the *Candor* case. In each of those cases, the Court as fact finder did not consider certain factual representations and so was able to avoid a finding of waiver. And that is what --

THE COURT: As I understand it, the Court chose to disregard the statements because it could reach a conclusion that was fair and appropriate without consideration. For

example, in the *E.F. Hutton* case, I understand it had to do with the timeliness, and so the Court can disregard the statements without having to reach it and still make its ruling. Whereas here, what you're asking the Court to do is to make findings of fact with only half of the information to rely on your client's incriminating statement that he stands by, but not to have the benefit of questioning of those positions that he submitted if his sworn statements.

MR. GERBER: Well, your Honor, a few points on that. I mean, first, in any situation, in any situation in which a court is applying the first prong of the *Klein* test, that issue arises. What I mean is, by the very nature of the inquiry and the question of whether or not there would be prejudice, the question is will there be prejudice in the absence of an opportunity to cross-examine regarding certain factual assertions.

So, that is in some sense, your Honor, a play in every single case where this issue arises, in every single situation in which a court is considering the first prong of *Klein*. So, to the extent that there is a concern that there is prejudice in the sense that there is a missed opportunity to cross-examine regarding certain factual assertions, your Honor, that's true in sometimes every *Klein* situation, and that can't be the type of prejudice that *Klein* is talking about, because if it were, that would sort of collapse the first prong of the

Klein test.

What *Klein* seems to be saying -- and *E.F. Hutton* makes this clear, written by the same judge in the same period of time -- is, is there a way to sort of restore the parties to where they would have been ex ante so that there isn't prejudice. And that's the prejudice question; not whether there's a missed opportunity for cross-examination regarding certain factual assertions, but whether in the absence of the Court considering -- the Court as fact finder considering certain assertions, a party is somehow prejudiced.

And, your Honor, in all of those cases, whether it's *Hutton* or *Candor* or *Vitamins Antitrust Litigation*, the Court was giving up consideration of certain factual assertions in those documents and then relying on whatever other evidence it was going to rely on. And it will vary, of course, from case to case. Here, the Court is in a position to do extensive fact finding and will be able to reach and can make factual findings and conclusions without those portions of the Fawcett affidavit.

THE COURT: Doesn't the prejudice prong really talk about distorted facts and whether or not the Court is left with distorted facts as a result of your client starting to speak and then stopping to speak?

MR. GERBER: Your Honor, again, if -- to the extent the concerns of the Court is -- a court or a party or fact

finder is losing the opportunity to cross-examine regarding certain statements, that will come up in every case. In any situation in which you're assessing prejudice under *Klein*, there will always be a missed opportunity for cross-examination. That's the very nature of the Fifth Amendment. The Fifth Amendment at its core does stand in the way of additional fact-finding. That is a hundred percent true. That is in the very nature of the right.

And what the Second Circuit is saying in *Klein* is that right is so important, that a court should only find that waiver if in the absence of doing that the fact finder is left with facts that prejudice one party or the other. And here, here the court as fact finder will not be left in a situation in which it is relying on facts that prejudice a party. It will have Mr. Fawcett's admissions, and otherwise neither party is worse off, and the Court can make its factual findings and factual inquiries, while crucially at the same time not finding a waiver which the Second Circuit has said should be done only in the most compelling of circumstances. And we respectfully submit you don't have those --

THE COURT: Right. So, if you're saying that I can't consider as prejudice the fact that we're left with an incomplete record, and we miss the opportunity to cross-examine your client on core issues to which he has already admitted to, when is there prejudice? If that can't be prejudice, when

would there be prejudice?

MR. GERBER: Yes, your Honor. So, I think there are a lot of situations where there would be prejudice. For example, in the trial context this comes up with great frequency and there are cases that that affect. *Klein* is a great example of that where the jury as fact finder was left with a distorted factual record.

There are numerous cases where a party to a litigation has taken a particular position, has benefited from that position, for example, to decline to answer certain questions in a deposition, to prevail on summary judgment, whatever tactical advantage a party has gained, and then there's prejudice. So whether it's in the trial context with a jury as fact finder, whether it's in any case where a party has gotten some benefit from its assertions, there there is prejudice, and consistent with *Klein* the Court would find or could certainly find waiver.

Here, your Honor, we are in a situation in which if the Court is fact finder, so you don't have that same concern about the fact finder sort of having a distorted -- relying on partial facts, and that's (inaudible) the *Vitamin Antitrust Litigation* according to the Supreme Court in *Gentile* makes that exact point.

And you also don't have the cases -- and we talk about this in our letter, your Honor. You don't have the scenarios

as recited in the cases relied upon by Saudi Arabia where a party has benefited, and then having benefited, wants to have its cake and eat it too. That's not the scenario that you have here.

If your Honor does not have questions on the first prong, I was going to turn to the second prong; and that is, was Mr. Fawcett on notice that he was waiving. And we submit that Judge Cote's recent decision in *Knopf* is critical here. Judge Cote makes the point citing the Second Circuit in *Miranti* that even within the same proceeding "a prior disclosure may not constitute a waiver when conditions have changed that create new grounds for apprehension." And that's Judge Cote earlier this year relying on Second Circuit in *Miranti*. The Supreme Court in *Mitchell* essentially makes the same point, and, your Honor, we respectfully submit that that's this case.

The Court on October 4 ordered an evidentiary hearing and gave notice that it was considering a criminal referral to the U.S. Attorney's Office for the Southern District of New York, and if that doesn't create new grounds for apprehension, I'm not sure what does; the product of a criminal referral --

THE COURT: Sorry. But that's not a condition that's changed. In the cases that you rely upon, there are factual developments, there's a change of law, there's significant time changes. Here, the conditions did not change. I merely stated what I think would be obvious to most people, particularly

following a nearly two-month lead-up that violating a court order can hold you in criminal contempt of courts. That's not a condition that's changed. It's merely a statement of what I think would be obvious to anyone who's filing a declaration under penalty of perjury. So I'm not sure it's correct to say that the conditions have changed because I heeded what I think would be obvious to all, particularly given the intense focus of this leak investigation.

MR. GERBER: Your Honor, of course we appreciate both the lead-up and obviously we appreciate the significance of anyone submitting something to a court particularly under penalty of perjury, but, your Honor, we would submit that what the Court just said might well be obvious to an attorney, I actually don't think it would be obvious to a non-lawyer. Obviously, it would be clear and it's clear, frankly, from the terms of the protective order, that sanctions could follow, incredibly significant sanctions could follow; but the fact that in a civil case the Court would be potentially referring an individual for criminal prosecution, I actually don't think that that would be obvious to a non-attorney, to a non-lawyer, and I think the phrasing is important: Grounds for apprehension. It's not just about changed facts. It's is the witness sort of in a newly situated position where he has reason to fear the consequences of his statements in a way that was not true before.

Again, your Honor, I'm in no way minimizing the significance of any situation putting in a sworn statement to a Court. But that said, I do think, particularly for a non-lawyer, there is a difference, I think essentially a big one, between submitting a document in a civil action and being told that a criminal referral to the U.S. Attorney's Office is in contemplation.

And that brings me to my final point, and that is, this is a very unusual situation. Mr. Fawcett is being directed to testify before the Court regarding the subject matter of a potential criminal referral by the Court. He is in a very real direct palpable sense being called as a witness against himself, and he wishes to exercise his constitutional right not to be a witness against himself, and we respectfully submit that he should be permitted to exercise that right.

Thank you.

THE COURT: Can I ask a followup question on that last point, which is, as I understand your position, he is standing by his incriminating statement; and so to the extent he wishes to not be a witness against himself, presumably that would be for some other possible crime than the violation of the court order that he's admitted to.

MR. GERBER: Your Honor, I think I understand the question, but I want to make sure. Your Honor, our position is that he has not waived, and having not waived, he would not

want to give additional evidence, in this case sworn testimony, regarding the matters addressed in the declaration. Those sworn statements would put him in legal jeopardy. And, yes, he's not asking the Court to strike the admissions regarding his own conduct. Your Honor, I think there's no question that testifying regarding those matters would have a potentially very significant impact on his jeopardy, sort of (inaudible) the evidence against him. And in the absence of waiver, he would exercise his Fifth Amendment privilege against self-incrimination.

THE COURT: All right. Thank you.

Mr. Kellogg, are you going to take the lead on behalf of the Kingdom?

MR. KELLOGG: I am, your Honor.

And I would like to start, if I may, with a quote from the Supreme Court's decision in *Mitchell v. United States*. "it is well-established that a witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." The Supreme Court has said that many times. The Second Circuit has said the same in *Klein v. Harris*, as has this court in *OS Recovery*. The privilege against self-incrimination has to be asserted when the witness first faces the decision whether to give self-incriminating testimony. John Fawcett made that decision on September 27, 2021 and then again on September 30,

2021 when he signed declarations confessing to violating this Court's protective order and destroying evidence that he did so.

Now, having decided to incriminate himself, he cannot take back that decision and assert the privilege to prevent cross-examination on the statements he chose to make in those declarations; otherwise, witnesses could distort the truth by testifying to some facts, denying or withholding others and asserting a privilege to bar cross-examination that would reveal the whole truth.

As this Court explained in *OS Recovery*, "This would make a mockery of the Fifth Amendment and frustrate efforts to achieve a just result." It is precisely what Mr. Gerber is proposing here.

Now, as you noted, the parties agree on the legal standard for a Fifth Amendment waiver. It's the two-prong test set out in *Klein v. Harris*, and we also rely on Judge Kaplan's decision in *OS Recovery*. If I may, I'd like to start with the second prong which asks "whether the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination." This is called the reason to know prong, and Mr. Fawcett's declaration easily meets it because they disclose an intentional violation of the Court's protective order, as well as the destruction of evidence.

Now, Judge Kaplan in *OS Recovery* explained that the reason to know standard requires: First, that the statements be testimonial; meaning, that they were made voluntarily under oath in the same judicial proceeding. And, second, that the statements be incriminating; meaning, that they directly inculpate the witness on the charges at issue. Both of those requirements are satisfied here. Fawcett made his statements voluntarily in sworn affidavits, and they could not have been more incriminating.

Now, counsel's suggestion that Mr. Fawcett did not anticipate the legal peril that he currently faces is baseless He knew the materials he sent to Mike Isikoff were subject to protective orders. He took great steps to hide his wrongdoing. He destroyed evidence. Of course, he was anticipating exactly the peril that he faces now. Now, his counsel says -- or in a prior letter, at least, said there is no suggestion in the record that Mr. Fawcett received any guidance that would have led him to believe that by submitting the declarations he would be subjecting himself to cross-examination for the purpose of determining whether he should be criminally charged.

Now, note, that statement is very carefully worded. No suggestion in the record -- and that may have been true at the time, but as we explained in a sealed letter filed with the Court today, that carefully worded denial was, at best, misleading. And in any event, as we explained in our letter,

when the case is cited at page 5 "whether or not he had the advice counsel is not an issue when he decided to submit the declarations is not relevant to the waiver inquiry."

I'd like to just briefly dismiss this point that relying on *Knopf*, that this is not a separate action. *Knopf* involved clearly separate actions. In fact, I will quote from Judge Cote's opinion: "*Phillips* and *Esposito* are separate actions alleging distinct claims against different defendants." Here, the Court started an inquiry into who leaked the documents to Michael Esposito. The same proceeding is now going on. Mr. Fawcett submitted his declarations in an early portion of that, and the same inquiry is still going to continue on Monday. So the second prong seems to me easily met.

So let's focus on the first prong, which asks whether the partial testimony creates a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth. Your Honor is quite correct in focusing on that language, and Mr. Fawcett's declaration meets that prong. Although he purports to accept responsibility for his actions, at the same time, he gives a self-serving account designed to mitigate his own culpability and to protect his long-time employers by claiming that he acted without their authorization or knowledge.

We have a right to cross-examine him on those

statements, and we expect cross-examination at the hearing next week will explore and reveal a number of false statements and omissions in Mr. Fawcett's testimony, declarations which would otherwise leave the Court with a distorted picture. To give just a few examples:

The September 27 declaration states that the transcript portions Mr. Fawcett's sent to Mr. Isikoff were focused on a particular topic. Cross-examination will explore that claim and present good grounds for believing it's not true.

The September 30 declaration describes a limited number of communications that Mr. Fawcett had with Mr. Isikoff. Cross-examination will explore material omissions in that admission.

Both declarations his describe Mr. Fawcett's motives in sending the transcript as a means of minimizing his culpability. Cross-examination will explore the validity of those explanations.

And, of course, both declarations minimize Mr. Fawcett's relationship with Kreindler & Kreindler, referring to himself as a consultant with no contract. Cross-examination will explore Mr. Fawcett's close and long-term relation with the firm.

Finally, both declarations state that Mr. Fawcett concealed his actions from Kreindler & Kreindler.

Cross-examination will explore whether the facts suggest that the firm knew or should have known of his actions.

And these points aren't just relevant to Mr. Fawcett's own responsibility. They also go to the actions of Kreindler & Kreindler and the attorneys at Kreindler & Kreindler who submitted Mr. Fawcett's declaration, to determine whether they participated in or had knowledge of the leak, and whether they made false statements to the Court about the leak or about their own investigation. Without cross-examination, the Court will undoubtedly be left with a distorted account.

Now, Mr. Fawcett claims that there will be no risk of prejudice to Saudi Arabia because the Court can simply strike the parts of the declaration that Saudi Arabia disagrees with, and that that would eliminate the prejudice so that he doesn't have to answer questions. Now, we are not aware, and Mr. Gerber cites no decision that has surgically edited a declaration in this way. All of Mr. Fawcett's cases -- *E.F. Hutton*, *Candor Diamond*, *Vitamins* -- they involve situations in the courts. The Court can strike or disregard the affidavit or offending declaration entirely and resolve the pending issue or motion or dispute without it and without any harm to integrity of this process.

They basically held -- and this is what the first prong is looking for -- that they were essentially irrelevant to the ultimate decision in the case and, therefore, did not

prejudice. That isn't a viable solution here. It would make a mockery of the Court's investigation to strike the declarations completely and pretend that Fawcett did not already confess to leaking the transcript. Even Fawcett understands that. So he's not proposing that the depositions be struck. Instead, he suggests that the Court go through and remove only the portions of the declaration that Fawcett no longer wants to address, such as his motivation in sending the transcript to Isikoff, how much of the transcript he sent, and his claims about what Kreindler & Kreindler knew and when they'd do it.

But that would achieve the very thing that the Supreme Court said in *Rogers* and the Second Circuit said in *Klein* is prohibited: "Opening the way to distortion of facts by permitting a witness to select any stopping place in his testimony." That's exactly what he wants to do. He wants to say, okay, well, I admitted to bake things, but I don't want you to question me about any of the details. And these declarations will necessarily be at the center of the hearing next week, which was called for the purpose of finding facts related to the jurat transcript. Fawcett cannot say "never mind" with respect to any portions of his declarations he doesn't want to be questioned about.

As Learned Hand said in *St. Pierre*: "The time for a witness to protect himself is when the decision is first presented to him. Anything more puts a mischievous instrument

at his disposal." By choosing to testify, a witness gives up his rights to refuse to answer questions within the proper scope of cross-examination.

I can cite 50 cases on that point. Mr. Gerber cannot cite a single would be.

Now, Mr. Gerber also argues that Fawcett cannot have waived his Fifth Amendment right because he was a non-party witness and was not acting for strategic advantage. He argues that in his letter, and that is triply wrong.

First, Fawcett was indeed acting for strategic advantage. Not only did he seek to minimize the significance of his actions in his declarations, but he also tried to protect the Kreindler firm from consequences, whether on his own initiative or at the attorney's urging. Now, that may have been a bad strategy for him personally. Perhaps he now regrets it, but it is certainly a strategy, and it's not credible for him to pose now as a disinterested non-party. Indeed, he's not a non-party. He's the subject of the Court's investigation, even if not a party to the underlying litigation.

And the third thing wrong with that is there is no requirement in a case law that a witness be a party or act strategically to waive Fifth Amendment rights.

The final point Fawcett argues is that it would be fundamentally unfair to find a waiver analysis because he wasn't expecting that. Again, that's not a legitimate

argument. By choosing to testify Fawcett gave up his right to refuse to testify on the details of his declaration. As the Court made clear in *Spinelli*, there is no fairness requirement on a Fifth Amendment waiver. And, if anything, Mr. Fawcett, who has worked as a legal investigator for 20 years, was better able to understand the legal system and the consequences of his admissions than many witnesses faced with similar choices.

So, in sum, he has waived his Fifth Amendment privilege as to questions concerning the subject of his declarations. The waiver extends to any questions that fall within the proper scope of cross-examination on his declaration. Every court has so held -- *Mitchell*, *Spinelli*, *OS Recovery* -- every court to reach this question has held it's proper to cross-examine on the subject matter of the declaration. And to the extent that we exceed those limits and ask him about something that's not within the scope of his declaration, which we will try not to do, the Court can make a determination at the hearing on that on a question-by-question basis.

Unless the Court has --

THE COURT: Mr. Kellogg, can you address the arguments that Mr. Gerber raised with respect to the changed circumstances, and whether or not the Court should see the October 4 as a change in circumstances such that Mr. Fawcett would have new apprehension at that moment that he might not

have had previously.

MR. KELLOGG: Yes, your Honor, I'd be happy to address that because the case law is clear that you don't have to know that you're going to be criminally charged or likely to be criminally charged. All you have to know is that the statements are incriminating; meaning, as Judge Kaplan explained in *OS Recovery*, that they directly inculpate the witness on the charges at issue here, which would be violation of the protective order and destruction of evidence.

The case law is also clear you don't have to have legal advice on that. You can't claim surprise afterwards. Indeed, the Supreme Court, as we cite in page 5 in our letter, says that even a criminal defendant who inculpates himself doesn't have a right to an attorney before that. The Sixth Amendment right attends only after he's been arrested, and statements that he makes can be used against him. That's in the criminal context.

In the civil context, statements made that clearly create legal jeopardy, which Mr. Fawcett with his long experience in this case would understand, are sufficient, and it's not a new proceeding as of October 4 when the Court issued its order. It's the same proceeding following up on the statements that Mr. Foster made in determining whether and to what extent those statements can be taken at full value or whether he has distorted some things in the course of making

his admissions.

THE COURT: Thank you.

Mr. Gerber, anything you'd like to say?

MR. GERBER: Yes. Thank you, your Honor. A few brief points in response.

So, first, starting where Mr. Kellogg just left off on the second prong, it is true, the law is clear -- and we are not saying anything to the contrary -- that you do not have to know that you're going to be criminally charged to effectuate a waiver. That is, of course, true, but that's a separate question from whether there are new grounds for apprehension. And the law is clear that when you have a new proceeding, a different proceeding, a waiver in a prior proceeding does not sort of carry over to the new proceeding. The reason for that rule, for that bright-line rule is this idea of new grounds of apprehension and a new proceeding. And Judge Cote's point in *Knopf* is that you can have new grounds of apprehension even within something that otherwise is the same proceeding.

And again, we submit that in a civil case, a hearing in contemplation of a criminal referral is precisely that type of new grounds for apprehension within what otherwise would be the same proceeding. It does fundamentally change things, and that's the idea of that line of cases.

Now, with regard to prong two, at one point Mr. Kellogg said that a statement of ours in one of our letters

was, at best, misleading. I want to be very clear, your Honor, there was absolutely no intent whatsoever to give an incorrect impression to the Court or to the parties. Saudi Arabia's letter of today was submitted based on information that we provided to them. We were not suggesting -- we did not say that Mr. Fawcett did not have access to counsel prior to October 4. That is not the argument we're making to the Court.

What we were arguing, what we argued today, is that the second prong of the *Klein* test is not satisfied because the Court's October 4 order created new grounds for apprehension. It was in this context that we noted there was no indication that prior to October 4 Mr. Fawcett understood he would be facing the prospect of a criminal referral.

On the first prong I just want to make the point again that the benefit of cross-examination, testing of statements to show information about statements, that can't be the prejudice test under *Klein* because if that were the test, it's hard to imagine when that test would not be satisfied. And for the prejudice prong to mean something, the question becomes: Could a fact finder disregard certain statements and still be fair to the parties? We think that is the case here.

And I also just want to say, I think these declarations do not mitigate Mr. Fawcett's culpability. Whatever else can be said about them, they put him in significant jeopardy, and this is not a situation, not even

close to a situation, where a party to a litigation is trying to gain some strategic or tactical advantage. Quite the opposite, really 180 degrees. Mr. Fawcett by putting in these declarations did not gain; he put himself in incredibly vulnerable position. Thank you, your Honor.

THE COURT: Thank you.

MR. KELLOGG: Your Honor, may I make one very brief point in response to the new grounds for apprehension language?

THE COURT: Yes.

MR. KELLOGG: There is not a line of cases on this issue. The first one is *Miranti* which involved a grand jury proceeding that was still ongoing, in which the defendant had made admissions to the FBI and been already convicted of conspiracy, but the statute of limitations had not yet run on various substantive crimes, and they wanted to compel him to testify about those crimes before the grand jury, which is a very different situation here.

And then as I pointed out, in *Knopf*, Judge Cote did use that new grounds for apprehension language but, again, held these were separate actions alleging distinct claims; not a single inquiry into a violation of protective order and the destruction of evidence.

THE COURT: Thank you.

MR. GERBER: Your Honor, if I may just for one moment?

THE COURT: Sure.

MR. GERBER: Just to follow up on the point about *Miranti*, if the same grand jury, the exact same grand jury, and there the individual had previously testified before that grand jury, putting himself in epic legal jeopardy, he actually had been prosecuted and convicted. Now in that case fast forward. He's going before that grand jury again, the same grand jury before which he testified regarding his criminal conduct, and the Second Circuit says no. Even though it's the same grand jury, even though you have the prior testimony, we are not going to find a waiver, and so I think for *Miranti* and then *Knopf*, when Judge Cote is applying that concept to a single proceeding, I think that precise logic applies here.

THE COURT: Thank you all. I appreciate everybody's time and arguments. I am prepared to rule from the bench, in part because I recognize that it's Thursday evening and our hearing is Monday, so I want to give the parties some clarity.

Obviously, everybody agrees on the standard here and I am just looking at *Klein v. Harris*.

Can I ask everybody to mute their line? I'm getting some feedback. Thank you.

So, everybody agrees that we're looking at the same standards here, *Klein v. Harris*. For the court reporter benefit, that's 667 F.2d 274. It's a Second Circuit decision from 1981, and it's a two-prong test -- we've been talking a lot about it tonight -- the first prong being whether or not

the witness's statement create a significant likelihood that the fact finder will be left with a distorted view of the facts.

And I recognize that waiver should only be found under the most compelling circumstances, and that there's a presumption that the right should attach. I think here, under these facts, that the Court would be left with distorted facts, specifically related to the extent to which Mr. Fawcett acted alone, as well as for the reasons for his actions. And I find that that would be sufficiently prejudicial. I think the case law here is quite clear, and Mr. Kellogg cited a number of the same cases that I have been locking at; that a witness is not permitted to begin to speak and then to stop speaking when he so chooses. I'm looking at the decision *U.S. v. St. Pierre* as well as *Rogers v. The United States*.

I think if we allowed Mr. Fawcett to at this stage stand by his incriminating statements but otherwise assert his Fifth Amendment rights, the Court would absolutely be left with distorted facts.

The cases that Mr. Fawcett relies on -- *E.F. Hutton* and the *Vitamins* case out of the D.C. District Court -- I don't believe that those cases apply. Those cases considered whether or not a court could simply excise an entire statement and reach its conclusions without referencing to the witnesses' statements.

For one, as we've been discussing, that's not even what's being proposed here. What's being proposed is some sort of melange, where we consider some of his statements but not others. But there's no way for the Court to reach its ultimate conclusion, which is the purpose of this hearing on Monday, without being left with distorted facts if we weren't allowed to question Mr. Fawcett about his prior statements that he submitted to under oath. So I find that the first prong of the *Klein* test is satisfied.

With respect to the second prong which we've been discussing as the sort of reason to know case, there's two parts to that second prong, and everybody seems to agree that his first statements were testimonial. They were made voluntarily, and they were certainly under oath. I understand Mr. Fawcett argues that we are in a different proceeding now that we're scheduling a hearing for the possibility of the Court making a referral to the U.S. Attorney's Office. So, like I said, everybody agrees that these were voluntary statements made under oath. They are in my view entirely of the same proceeding, and I don't believe that the *Knopf* case is similar.

This issue has been before the Court since roughly the end of July. We have been having extensive proceedings related to this breach. The hearing is simply the next step in that process, and to conclude that once the Court announced the

hearing would be held and the possible remedies that were available to the Court -- remedies which were obvious and known to anyone, including Mr. Fawcett -- I don't believe that puts us into a new proceeding here. So I find that that first part of the *Klein* test is satisfied.

And certainly the second part is as well. The statement was incriminating, and, as I understand, Mr. Fawcett stands by it. It relates directly to the issue that is the focus of our hearing, and I don't think that there is any plausible argument that Mr. Fawcett did not understand that when he admitted to violating a Court order, particularly after the intensive focus the Court has had on this issue, and additionally admitted to all of his actions to hide that from the Court, and then the fact that he destroyed the evidence in furtherance of his goals, I don't believe we can argue in good faith that he has new apprehension that he did not understand. In fact, the evidence suggests that Mr. Fawcett fully knew the nature of his conduct and the consequences, and in fact he acted consistent with that by trying to hide it from the Court and potentially from his employer. So, I find that under the *Klein* test, both elements are met for waiver, and I will require Mr. Fawcett to testify and answer questions at the hearing on Monday.

To the extent that there are questions that may enter into other areas that may create other liability for

Mr. Fawcett, I can deal with those objections on a question-by-question basis, but otherwise I expect Mr. Fawcett to appear and answer questions on Monday.

And that is my ruling. All right. Well, I will see everybody on Monday.

MR. GERBER: Your Honor? I'm sorry, if I may, just two very quick points?

THE COURT: Yes.

MR. GERBER: If I may?

Just first, just for the record, we do not dispute that the declarations describe a violation of the Court order, but I do want to be clear that we are not conceding criminal conduct. The Court used the word incriminating. I just -- again, violating a court order puts him in jeopardy, but we are not conceding on behalf of our client that the statements are incriminating full stop. We are not conceding that, your Honor.

THE COURT: Of course not. And as I've indicated, after the hearing, I anticipate the parties will file proposed findings of fact and conclusions of law, and it will be an opportunity for you to make that point again.

MR. GERBER: Yes, your Honor. The other point is we would like an opportunity to be heard before Judge Daniels. We intend to write to Judge Daniels this evening to ask to be heard in this matter. Would the Court stay its order solely so

that we can have the opportunity to raise this issue before Judge Daniels?

THE COURT: I don't really know what a stay of the order means. We have the hearing scheduled on Monday. In light of COVID, among other things, scheduling that conference was a Herculean effort, so I was sensitive to the possibility that you may seek an appeal, which is, in part, why I was prepared to rule today. We've addressed this motion as quickly as we could. So my recommendation is that you make your application as soon as possible. We will facilitate it by simply letting his law clerk know that this is coming, and hopefully it can be heard tomorrow, but I'm not inclined to reschedule Monday's conference.

MR. GERBER: Understood. Thank you, your Honor.

THE COURT: All right. Anything further?

Hearing nothing, I will see you all on Monday. Thank you everybody. We're adjourned.

MR. KELLOGG: Thank you, your Honor.

MR. GERBER: Thank you, your Honor.

(Adjourned)